



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 81 of 2012**

**BETWEEN**

**QUEENVELLE ATIENO OWALA .....**  
**.....CLAIMANT**

**VERSUS**

**CENTRE FOR CORPORATE GOVERNANCE.....**  
**.....RESPONDENT**

*Rika J*  
*CC. Leah Muthaka*

*Mr. Mun gla instructed by Paul Mun gla and Company Advocates*

*Mr. Khaseke instructed by Mohammed Muigai Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION.

**AWARD**

1. Queenvelle Atieno Owala filed this Claim on 24<sup>th</sup> January 2012. The Claim is brought against her former employer, the Centre for Corporate Governance. The Centre is an independent organization, committed to the improvement of leadership, by fostering the highest standards of corporate governance in corporations of all types, through training, research, monitoring, evaluation and advocacy. It has contracts across Africa. One of its Clients, as told to the Court by its CEO Dr. Joshua Abong'o Okumbe, is the Judicial Service Commission of Kenya. It is a serious Organization, not one of the briefcase NGOs, proliferating this field in Kenya.

2. The Centre filed its Statement of Reply on 8<sup>th</sup> February 2012. Queenvelle gave her evidence and closed her case, on 29<sup>th</sup> October 2012. Dr. Okumbe testified for his Organization and wrapped up the case for the Respondent, on 25<sup>th</sup> January 2013. Parties were advised by the Court to file and exchange closing submissions within 28 days of the closure of the proceedings. The dispute was last mentioned in Court on 13<sup>th</sup> March 2013, when the Court confirmed the receipt of the closing submissions, and offered to deliver its Award by notice to the Parties.

3. The Claimant testified that she was employed by the Respondent with effect from 23<sup>rd</sup> March 2009. She was issued a letter of employment dated 15<sup>th</sup> February 2009. Her contract was initially for one year.

She was to be assessed at quarterly and annual intervals. Her contract was renewable, for a further period of two years, based on successful completion of the first year. She earned a gross monthly salary of Kshs. 200,000, and was entitled to gratuity of 15% of her salary for each year successfully completed in employment. She was entitled also, to a performance-bonus equivalent to 5% of the net annual surplus made from research and training programmes.

4. Queenville completed the first contract successfully, and the Respondent extended her contract for two years, effective from 23<sup>rd</sup> March 2010. The extension was justified on among other grounds, the Board's confidence in the Claimant. Her salary was to be reviewed to Kshs. 210,000 from 1<sup>st</sup> April 2010 and Kshs. 221,762 from 1<sup>st</sup> April 2011. The gratuity clause was retained, payable on the successful completion of the cumulative three years. Performance-bonus was payable as in the initial one year. She was entitled to 30 days of annual leave.

5. On 14<sup>th</sup> July 2011, Dr. Okumbe wrote to the Claimant terminating her contract of employment. He informed her that the Respondent's Audit, Finance and Staff Matters Committee, had sat on 13<sup>th</sup> July 2011. It recommended that her services as the Business Development Manager, be terminated with immediate effect. The grounds for termination were listed to be:-

- a) Claimant's lack of capacity to undertake initial responsibility as the Business Development Finance and Administration Manager in the first year of her contract;
- b) Her lack of capacity to undertake the new position of Business Development Manager in the second year of her contract, a position which was created due to her inability to discharge responsibilities in [a] above;
- c) Inability to work cordially with her colleagues;
- d) Lack of capacity to produce a number of reports and documents, some which had been pending since August 2010; and,
- e) Gross insubordination.

6. The Claimant testified that her contract was terminated without regard to her procedural guarantees under Section 41 of the Employment Act 2007. Termination was unfair under Section 45 of the Act. The Respondent did not give her valid reason or reasons for termination and rules of natural justice were not observed. She claims:-

- a) Kshs. 1,848,016.67 being the lost income for 8 months and 10 days, relating to the period between 14<sup>th</sup> July 2011 and 22<sup>nd</sup> March 2012;
- b) Kshs. 360,000 being the gratuity earned for the first year of employment ended 22<sup>nd</sup> March 2010, computed at the rate of 15% of gross annual salary;
- c) Kshs. 379,080 being the gratuity earned for the second year of employment ended 22<sup>nd</sup> March 2011, computed at the rate of 15% of the annual gross salary;
- d) Kshs. 121,969 being the gratuity earned from 23<sup>rd</sup> March 2011 to 14<sup>th</sup> July 2011 at the same rate of 15% of annual gross salary;
- e) Kshs. 277,202 being the lost gratuity resulting from the illegal termination; and
- f) Earned leave days for the period between 23<sup>rd</sup> March 2011 and 14<sup>th</sup> July 2011, a period of 3 months and 20 days, amounting to Kshs. 67,760.61.

The Claimant prays for a total of Kshs. 3,054,028; interest at court rates; and costs.

7. The Claimant testified that her initial position was redesigned to make it more focused and productive. She served in this role focusing on development. This was based on the confidence the Board reposed in her. There were no serious issues raised against her performance in the appraisals. Her duties were detailed in the Human Resource Manual. She was never called to answer any of the accusations detailed in the termination letter. She learnt of the accusations in the letter of termination. She did not get a formal letter of termination, other than the letter recommending termination. She wrote a demand letter to the Respondent after termination, asking the Respondent to remedy the violation. There was no substantive response. The Board did not terminate; a Committee recommended, but there was no termination. The Board was her employer. She was not given an opportunity to defend. She had more than 8 months left in her contract.

8. Interrogated by the Advocate for the Respondent, Queenville testified that she was at the date of the hearing, a student at the Kenya School of Law. Her letter of employment had a termination clause. Either party could terminate through the giving of 1 month notice or payment of 1 month salary in lieu of notice. She was paid for the 14 days worked in July 2011 and paid 1 month salary in lieu of notice. These were paid 2 months after termination. She agreed she did not disclose this to the Court in her evidence. Termination was unfair because she felt ambushed. She was not given a chance to explain. The termination clause did not say she needed to be given reasons; rules of natural justice required she is given reasons. The appraisal in the Statement of Response page 58, states that her performance was below expectation. The job was redesigned because there was a problem. The extension of the contract had preconditions- evaluation and ability to deliver. There were tasks she had not performed promptly. She reported to the CEO. She explained at the Statement of Response page 92, why she could not deliver. There were email exchanges between her and the CEO. There were deliverables she had not met. This was a performance issue. She explained that she was still given a 2 year extension. The income earned was to compensate her for services rendered. She was not to be compensated after termination, as she was not rendering any services. Termination was illegal. The contract had a termination clause and there was no guarantee she would serve the full three years. Gratuity was payable at the end of the full three years. She admitted she claims gratuity for 8 months left in her contract. She did not work in the 8 months. She claims proportionate leave. It is true she had a problem with a workmate called Judith.

9. Redirected, Queenville testified that she received notice pay equivalent to 1 month salary, and salary for 14 days worked in July 2011. She did not think these were in issue, as she does not lay any claim to them. She was appraised in the first year, and comments by her supervisor made. After this, her contract was extended. The Board stated extension was based on good performance and confidence it placed in her. She was not appraised for the second year. She responded to the email from her supervisor. She was not asked to explain all the allegations. She ought to have been heard. Her employment contract was also governed by the Human Resource Manual. It was not to be read in one document. There were reasons given by the Respondent in termination. It was not a simple matter of invoking a termination clause. Queenville prays the Court to uphold her Claim.

10. The Respondent admits the Claimant was its employee. She was employed after she made misrepresentations to the Respondent about her qualification. She indicated in her Curriculum Vitae that she had *“BA majoring in Finance and Economics; ACCA, currently preparing for final papers 3.5, 3.6 and 3.7; and, preparing for the Chartered Financial Analyst Program CFA level 1.”* The possession of ACCA and CFA qualifications were imperative to the role of Business Development Finance and Administration. She undertook during her interview on 19<sup>th</sup> April 2008, to finish the papers and forward the certificates to the Respondent. At the time she was hired on 15<sup>th</sup> February 2009, she indicated she had finished her papers, and would submit the originals to the Respondent. At the time she was dismissed, Queenville had not availed the certificates to the Respondent.

11. Her inability to discharge her role stemmed from her lack of qualifications in ACCA and CFA. Owing to poor performance in her first year of employment, she was informed that renewal would depend on performance. In an *Aide Memoire to the African Capacity Building Foundation [ACFB] Mid- Term Review of the Centre for Corporate Governance [CCG] September 2009*, the AFCBF External Consultant

observed at page 6, that the Claimant was having challenges in fulfilling her mandate as the Business Development, Finance and Administration Manager. The Report noted that the Claimant had failed to put in place documentation for the internal audit system by the end of 2009. This was an important aspect of monitoring. In a subsequent Report of May 2011, it was observed that *“though the original project document has provided for the position of Finance Manager, the Centre has recruited for the position of the Business Development, Finance and Administration Manager, but after review, the Center realized that the Officer recruited could not adequately handle the finance aspects.”* Her appraisal of 16<sup>th</sup> July 2009 was *‘well below what is expected.’* In October 2009 her performance was rated as *‘fair.’* Her performance was the subject of discussion between her and the CEO.

12. In an e-mail of 28<sup>th</sup> June 2011, she was reminded she had failed to prepare and present two reports for Chairman’s Workshops, held in August and September 2010. She failed to develop business development data base, which had been pending since 15<sup>th</sup> February 2009. The failures impacted on the Respondent’s ability to secure further funding to the tune of Kshs. 5,500,000, in areas where the reports were required. She was advised to complete these reports, failing which her services would be terminated. She willfully neglected to perform her duties, and the Respondent was entitled to summarily dismiss her. Dismissal was not unfair. The CEO discussed the poor performance with her on various occasions, before arriving at the decision to summarily dismiss her. The Respondent prays the Court to reject the Claim.

13. Dr. Okumbe testified he has been the CEO of the Respondent for 6 years. He has worked for the Centre for an overall 12 years. He holds a Bachelors Degree in Botany and Zoology from the University of Nairobi, Masters in Education Management from Kenyatta University, and Doctor of Philosophy from the University of Nairobi. The Respondent is registered as a company limited by guarantee, whose work revolves around developing best practices in corporate governance in Kenya and Africa as a whole.

14. He came to know the Claimant in 2008. She was interviewed by the Respondent for the advertised job, and emerged top because she claimed to be qualified as a Certified Financial Analyst [CFA]. She was issued the letter of employment dated 15<sup>th</sup> February 2009. She was like the Deputy CEO of the Respondent. Dr. Okumbe evaluated Queenville and found her performance very weak. He was prepared to terminate her contract, but on compassionate grounds, decided to extend the contract. The Respondent expected the Claimant would learn in her 2<sup>nd</sup> and 3<sup>rd</sup> year. The extension was in a different role, almost similar to the one she served in the 1<sup>st</sup> year, but trimmed down. She was offered 15% of her gross salary as gratuity on successful completion of the 3 year contractual period. The renewed contract had a termination clause. She failed to prepare data base and strategic plan for the Respondent. The CEO and the Claimant discussed the Claimant’s performance at various times.

15. She was told by the Respondent that her reports were late in reaching the Respondent. The Respondent was losing money as a result. She was given time, but no report was forthcoming. Her failures were listed in the letter of termination. She was advised she would be paid her terminal benefits on handing over the reports. To-date, she has not handed over some of the reports, desktop and modem. She was paid for 14 days worked in July 2011, and paid notice pay. These were paid in September 2011. Delay was occasioned by the Claimant’s refusal to hand over. She was paid a net sum of Kshs. 233,745 on compassionate grounds. The Chairman of the Respondent requested Dr. Okumbe to pay. Queenville’s mother had passed away. The Respondent was compassionate to the Claimant at different times. She had inability to work with other staff. Her relations with colleagues were very poor. She had problems with the Training Manager. She was the overall in charge of finances, but had a sour relation with the Accountant. Gratuity was conditional. She did not meet the condition and cannot be paid gratuity. She was granted study leave, consonant with the accrued leave period. The Board decided to terminate in accordance with the letter of appointment. There was no need to call her, because the issues were straightforward. As far as the Respondent was concerned, termination was fair.

16. Answering questions from the Advocate for the Claimant, Dr. Okumbe denied that he had a personal relationship with Queenville. His relationship with her was confined to the employment relationship. The discussions held with her relating to her work performance were not recorded in her personnel file. Her relationship with the Accountant was frosty. The issue was discussed between the Claimant and Dr.

Okumbe. It is not recorded in the Claimant's personnel file. Her bad work relations impacted adversely on her output. This was not captured in her personnel file. There were many issues that happened but were not minuted. The Board asked the CEO to extend the Claimant's contract despite her shortcomings. The 1<sup>st</sup> year was not productive and successful. She was number one at the interview. Her qualifications were compared with the job requirements. On renewal, she failed to bring all her documents. She was hired regardless of the omission. The letter of appointment says appointment was based on enviable performance.

17. Her gross monthly salary was Kshs. 200,000. She was entitled to 15% of the annual gross salary at the end of every year, as gratuity. Payment had accrued as per the employment letter. The second letter of appointment did not indicate that the Board was acting out of compassion. Her first quarter in the year 2009 was satisfactory. It was on the basis of this satisfactory work that extension was granted. Dr. Okumbe denied that he ever misled the Board and the Respondent's Clientele. The Human Resource Manual applied to her. It provided for payment of lump sum gratuity, payable at the end of each contract, calculated at 15% of the gross annual salary. There was no discrimination against the Claimant. The Board upheld the recommendation of the Finance Committee to terminate. The Board was not obliged to adopt the recommendation. The Committee did not call Queenville. It knew these were clear issues. Termination letter gave reasons, and stated these were 'among other reasons.' Failure to produce her CFA certificate was captured in the grounds given to her upon termination. Redirected, Dr. Okumbe stated that he did not receive any communication from the Claimant after termination. She mentioned colleagues she was not able to work with, in her letter to Dr. Okumbe dated 20<sup>th</sup> July 2011. The new letter of appointment left out the finance designation, leaving the Claimant with the role of business administration, because she was not able to handle finance. All appraisals pointed to poor performance. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

#### *The Court Finds and Awards:-*

18. There is common evidence that Queenville was initially employed by the Respondent, as its Business Development, Finance and Administration Officer, with effect from 23<sup>rd</sup> March 2009. Her monthly gross salary was Kshs. 200,000. She was entitled to a gratuity payment of 15% of the annual salary for each successful completed year. She was entitled to 5% of the net annual surplus made from research and training programmes. These terms are not contested and are spelt out in the letter of appointment, dated 15<sup>th</sup> February 2009. The contract also stipulated that the contract would be renewed for a period of 2 years, based on the Claimant's successful and productive completion of the first year. She was to perform her duties under the overall guidance of the CEO.

19. On 6<sup>th</sup> April 2010, the CEO Dr. Okumbe wrote to the Claimant advising her that *"In its 31<sup>st</sup> meeting held in Mombasa Serena on 27<sup>th</sup> March 2010, the Board resolved amongst other issues, that your contract be extended for a period of two years with effect from 23<sup>rd</sup> March 2010. This extension is based on your performance on this newly redesigned position in the last quarter, and will be contingent upon availability of funds, and your quarterly performance and evaluation reports."* The Claimant was informed that her salary would be Kshs. 210,600 starting from 1<sup>st</sup> April 2010, and rise to Kshs. 221,762 from 1<sup>st</sup> April 2011. She was told she would receive gratuity at the rate of 15% of her annual gross salary, on successful completion of her cumulative three year contract. The performance-based bonus of 5% of the net surplus of income made from training and other developmental programmes was retained. The new contract made it clear that the Human Resource Policy Manual was part of the Claimant's contract of employment.

20. The Claimant did not serve to the end of the 3 years. On 14<sup>th</sup> July 2011, she received a letter of termination from Dr. Okumbe. She was informed that the Audit, Finance and Staff Matters Committee had recommended the Claimant's contract be terminated with effect from 14<sup>th</sup> July 2011. Termination was necessitated by among other issues:-

- The Claimant's lack of capacity to undertake her initial responsibility as the Business

Development, Finance and Administration Officer in the first year of her contract;

- The Claimant's lack of capacity to undertake the new position of the Business Development Manager in the second year of her contract, a position which was created due to her inability in number one above;
- Her inability to work with her colleagues;
- Her lack of capacity to produce reports, some which had been pending since August 2010; and
- Gross insubordination of the authority of the CEO.

She was advised that her terminal dues would be paid upon her submission of certain reports and documents.

21. The Claimant proceeded to answer the allegations made in the termination letter, but the decision had already been made. The Claimant was subsequently paid 1 month salary in lieu of notice, and salary for 14 days worked in July 2011. The issues raised by this dispute are: whether the termination was fair, made for valid reason or reasons, following fair procedure; and, whether the Claimant is entitled to compensation, and gratuity payments under the various contracts.

22. It is the duty of the employer under Section 43 and 45 of the Employment Act 2007, to show the presence of valid reason or reasons justifying the termination decision. In this dispute, the Respondent alluded to a variety of reasons as justifying its decision to terminate. It states that the Claimant misrepresented she was in the process of acquiring Chartered Financial Analyst [CFA] Certificate, at the time of the initial interview. This in the view of the Court was not a valid ground for termination. The Claimant was recruited at the top of her league. The Respondent termed her performance at the interview as enviable. She went on to work for the first year. The Board recommended Queenville gets a renewal over the next two years. There is nothing on record to show that the CFA certificate was considered an issue by the Respondent at the time the Claimant joined the Respondent, or during her tenure. It was not even one of the reasons stated in the termination letter, as justification for termination. Dr. Okumbe's explanation that the termination letter stated the given reasons were '*among other issues,*' cannot be accepted by the Court. The Employment Act 2007 does not contemplate generalized grounds of termination. Valid reason or reasons must be specifically stated, explained to the employee and understood by the employee. An employer has no reason to base its decision on accusations of a general nature.

23. The specifically given grounds in the letter of termination are hollow and do not in the least, pass for valid grounds of termination. The Respondent alleged the Claimant lacked capacity to undertake her initial first term contract. How is that so, and yet the Respondent proceeded to give her two more years, and testified through Dr. Okumbe that her performance for the last quarter in 2009 was satisfactory? It would not make sense for the Board to endorse the Claimant for renewal, show confidence in the Claimant, if she lacked capacity, to undertake her responsibilities under her first contract. The same can be said of the renewed contract. The Respondent stated the Claimant lacked capacity, but tellingly, she was well on her last year of the contract by the date of termination. She was 8 months away from completion. Why would a reasonable employer wait this long to move against a senior employee, no less than the Deputy CEO, if she did not have capacity to discharge her role? The assertion that the Claimant was unable to work with her colleagues, was not substantiated in the evidence of the Respondent. The Claimant made an answer to the allegation after termination. The explanation given by her on her incompatibility was not discounted by the Respondent in its evidence. The Respondent charged that the Claimant failed to produce a number of reports, leading to loss of donor confidence in the Respondent. The Claimant listed numerous reports she was able to generate, and also explained in her response to the letter of termination that she had gone her way out to edit certain reports prepared by other officers, to meet the standards demanded by the Clients. The Respondent, in its evidence, said nothing of the explanation by the Claimant. The Termination letter mentions that the Claimant involved herself in gross insubordination. The CEO did not say anything in Court that gives credence to that charge. There was not

a single piece of evidence given by Dr. Okumbe, indicative of gross insubordination. The Respondent did not show substantive justification in the decision to terminate.

24. The situation was made worse by the attitude of the Respondent with respect to the Claimant's procedural guarantees. Dr. Okumbe testified that the Board decided to terminate the Claimant's contract without summoning her to appear before it, because the issues were straightforward. This was a common refrain by Dr. Okumbe; that the Claimant knew what the issues were, and did not deserve a formal hearing. The law does not envisage deprivation of an employee of her procedural guarantees under Section 41 and 45 of the Employment Act, on the basis that the accusations against the employee are self-evident. The recommendation to terminate the Claimant's contract originated from the Audit, Finance and Staff Matters Committee. The recommendation was not followed by any disciplinary hearing. There was not even a letter of termination given by the employer to the employee. She left on the strength of the recommendation that her contract be terminated. There was no decision communicated to the Claimant on the actual termination. Section 41 and 45 which require the employee to be heard before termination were completely ignored. It was not the proper approach for the Respondent to presume and conclude, that the Claimant was guilty of insubordination; incompatibility; or poor performance. The Respondent was under obligation to hear the Claimant on each allegation before termination. It was insufficient that the Respondent had various discussions with the Claimant. It was immaterial that the Claimant was even at one time appraised and found wanting by Dr. Okumbe. Appraisal and discussions held between employees and their employers touching on employee's work performance, do not add up to a disciplinary hearing, and can only be evidence in support of good or poor performance at a disciplinary hearing. Whatever records the Respondent held against the Claimant were to be subjected to the rigours of a disciplinary process, before a decision could be made. Termination was lacking in both substantive validity and procedural fairness. The Claimant is entitled to compensation. **The Claimant shall be paid 5 months' gross salary at Kshs. 1,108,810 in compensation for unfair termination.**

25. The Claimant finished her first year successfully, and there is no reason why she was not paid her gratuity as promised in her first letter of employment. The letter stated, "*you are entitled to a gratuity payment of 15% of annual salary of each successful completed year.*" She took up her position on 23<sup>rd</sup> March 2009. The first year ended successfully on 22<sup>nd</sup> March 2010, after which the Respondent offered the Claimant extension of two years. The first gratuity became payable under the first contract, on 22<sup>nd</sup> March 2010. **The Claimant is granted her accrued gratuity for the period computed at 15% of 200,000 x 12 = 360,000.** The Respondent appeared to word the second letter of appointment differently from the first, in an attempt to deprive the Claimant her gratuity. The new letter suggests gratuity would be paid on completion of three years. The first gratuity had already accrued before the renewal. In the understanding of the Court, gratuity was payable after each year of service, as provided for in the Respondent's Human Resource Policy Manual. The ambiguity introduced by the Respondent in its letter of renewal, can only be interpreted against the Respondent, who authored both the letters of employment, and the Human Resource Policy. The message from the initial letter of employment, and the Human Resource Manual, section 2.2.4, is that every year fully served would attract gratuity payment. The Claimant completed her second year on 22<sup>nd</sup> March 2011. Gratuity for the second year became payable. **She is granted gratuity at 15% of 210,600 x 12 = Kshs 379,080.** The Claimant seeks proportionate gratuity for the period dating from the end of her second year- 22<sup>nd</sup> March 2011- to the date of termination- 14<sup>th</sup> July 2011. This is not payable. The contract contemplated that only completed years of service would be rewarded by payment of gratuity. This is the case also, with the claim for gratuity, for the 8 months left to the completion of the full 3 years of the contract. Whatever the cause of the premature termination, there was no possibility that gratuity is pegged on incomplete period of service. The fact that the Claimant lost the potential to earn more gratuities is a consideration, in assessing whether termination was fair, and consequently, in arriving at a fitting level of compensation. The claims for additional gratuities are declined. In the same breath, her claim for lost income for the incomplete 8 months is rejected. She did not render any labour, and would not be entitled to unearned salaries. The Court is satisfied finally, that the claim for earned leave days is merited. **The Claimant is allowed Kshs. 67,760 in earned leave days.** In sum-:

**[a] Termination was unfair both on procedure and substance;**

***[b] The Respondent shall pay to the Claimant compensation; gratuities; and leave days as detailed above, amounting to Kshs. 1,915,560;***

***[c] The said amount shall be paid in full within 30 days of the delivery of this Award; and***

***[d] No order on the costs.***

Dated and delivered at Nairobi this 31<sup>st</sup> day of May 2013

**James Rika**

**Judge**